

KELLEY DRYE & WARREN LLP

A PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS

DOCKET FILE COPY ORIGINAL

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D. C. 20036

(202) 955-9600

FACSIMILE

(202) 955-9792

RECEIVED

APR 16 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

NEW YORK, N.Y.

LOS ANGELES, CA.

MIAMI, FL.

CHICAGO, IL.

STAMFORD, CT.

PARSIPPANY, N.J.

BRUSSELS, BELGIUM

HONG KONG

AFFILIATED OFFICES

NEW DELHI, INDIA

TOKYO, JAPAN

April 16, 1998

DANNY E. ADAMS

DIRECT LINE (202) 955-9874

via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

**Re: Petitions Seeking Declaratory Ruling Preempting Arkansas
Public Service Commission -- CC Docket No. 97-100**

Dear Ms. Salas:

On March 25, 1997, American Communications Services, Inc., d/b/a e.spire Communications, Inc. ("e.spire") filed a Petition for Declaratory Ruling ("e.spire Petition") requesting that the Commission preempt the Arkansas Public Service Commission ("Arkansas PSC") in its arbitration of local interconnection decisions pursuant to the powers granted to the Commission by Sections 252(e)(5) and 253(d) of the Communications Act of 1934, as amended ("Communications Act").¹ This preemptive action was made necessary by the passage of the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act") which effectively prohibits the Arkansas PSC from fulfilling its role as an arbitrator under Section 252 of the 1996 Act.

Comments on the e.spire Petition were filed on May 5, 1997, and reply comments were filed on May 20, 1997.² On June 3, 1997, MCI Telecommunications Corporation, Inc. ("MCI") filed a similar petition ("MCI Petition"). Comments on the MCI Petition were filed on

¹ 47 U.S.C. § 252(e)(5) (1996).

² On April 3, 1997, the Commission released a Public Notice in CC Docket No. 97-100, DA 97-652, requesting comments on the e.spire Petition.

No. of Copies rec'd 0+1
List ABCDE

July 7, 1997, and reply comments were filed on July 22, 1997.³ The FCC consolidated the petitions into a single proceeding in CC Docket No. 97-100. Both Petitions remain pending.

Since the closing of the comment cycles, there have been a number of significant developments of relevance to the matters raised in the e.spire Petition. On February 18, 1998, the Arkansas PSC issued its Order No. 11 in ongoing interconnection arbitration proceedings between AT&T Communications of the Southwest, Inc. ("AT&T") and Southwestern Bell Telephone Company ("SWBT").⁴ In that Order, the Arkansas PSC concluded that "[its] authority 'is limited to the terms, conditions and agreements pursuant to which' SWBT 'will provide interconnection, resale, or unbundling' to AT&T and [it] is without authority to order SWBT to provide any terms or conditions in an interconnection agreement which SWBT is not willing to provide to AT&T as a CLEC."⁵ In other words, the Arkansas Reform Act ties the hands of the Arkansas PSC in favor of the incumbent local exchange carriers ("ILECs") and prevents it from fulfilling its arbitration duties under the 1996 Act.

By memorandum dated February 25, 1998, the FCC issued requests to AT&T and SWBT to respond to a series of questions regarding Order No. 11. Those companies responded on March 5 and March 10, respectively. As explained below, e.spire believes that Order No. 11 and the ex parte submissions filed with the FCC concerning that decision make clear the need to grant the e.spire Petition expeditiously.

In its ex parte filing, SWBT contends that the Arkansas PSC has interpreted the Arkansas Act only to preclude it from imposing upon ILECs any interconnection, unbundling, or resale obligation beyond those required by federal law. However, a closer examination of Order No. 11 shows that AT&T's position is more precise. AT&T stated that the Arkansas PSC views the Arkansas Act as a "mandatory rule of construction" prohibiting it from interpreting the 1996 Act in any way contrary to the wishes of the ILECs.⁶ The Arkansas PSC reiterates this position throughout Order No. 11; that is, it cannot impose "even those obligations specified in the FCC's *Local Competition Order*, unless SBC agrees to them."⁷ Indeed, the Arkansas PSC concluded as follows:

The overall impact of [the relevant section] of [the Arkansas Act] is to impose restrictions on the terms and conditions under which a CLEC can

³ On June 6, 1997, the Commission released a Public Notice in CC Docket No. 97-100, DA 97-1190, requesting comments on the MCI Petition.

⁴ *AT&T Communications of the Southwest, Inc.'s Petition for Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Sec. 252(b) of the Telecommunications Act of 1996*, Order, Arkansas Public Service Commission, Docket No. 96-395-U, Order No. 11 (filed Feb. 18, 1998).

⁵ *Id.* at 6.

⁶ See SWBT and AT&T Responses to Question No. 5.

⁷ See AT&T Response to Question No. 5.

obtain interconnection with an ILEC and impose restrictions on [its] authority to require an ILEC to provide interconnection to a CLEC on terms not agreeable to the ILEC (emphasis added).⁸

* * * *

To the extent that an ILEC, SWBT, *is willing to provide* interconnection . . . [the Arkansas PSC] is without authority to order the ILEC, SWBT, to provide interconnection, resale, unbundling to a CLEC, AT&T, on any different terms, conditions or prices than those proposed by the ILEC (emphasis added).⁹

* * * *

Pursuant to the restrictions on the [its] authority in [the Arkansas Act], [the Arkansas PSC] has no authority to order SWBT to provide interconnection, resale or unbundling to AT&T on any different terms and conditions *than SWBT will agree to provide such services to a competitor* . . . (emphasis added).¹⁰

* * * *

[The Arkansas PSC] is without authority to order SWBT to provide any terms or conditions in an interconnection agreement *which SWBT is not willing to provide* to AT&T as a CLEC (emphasis added).¹¹

In its Response to Question No. 6, SWBT makes plain its position. It states: "In Order No. 11, the Arkansas PSC correctly concluded that, *if SWBT agrees* to provide interconnection, resale, and unbundling on terms and conditions that meet the *minimum requirements* for interconnection specified in Section 251 of the 1996 Act, including the regulations prescribed by the FCC pursuant to section 251, then the Arkansas Act prohibits the PSC from requiring anything more (emphasis added)."¹² e.spire concurs with AT&T's observation that in ascertaining the requirements of Section 251, federal law requires that the Arkansas PSC consider not only the language of Section 251, but also the language of the Act as a whole, its legislative history and underlying policy, and its overall purpose – the creation of local competition.¹³ If the Arkansas PSC has no authority to consider or implement something that is disagreeable to the

⁸ Order No. 11 at 3.

⁹ Order No. 11 at 4.

¹⁰ Order No. 11 at 4.

¹¹ Order No. 11 at 6.

¹² SWBT Response to Question No. 6.

¹³ AT&T Response to Question No. 4.

ILECs or not expressly laid out in the *Local Competition Order*, then it is incapable of complying with Congress' directives in Sections 252(b)(c) and (e).

The crux of the issue presented here is the fundamental disconnect between the Arkansas Act and the federal Communications Act; that is, the Arkansas Act's limitation of the PSC to the "minimum" requirements of the federal Act, on the one hand, and the federal Act's failure to prescribe any "minimums," on the other. Instead, the federal Act establishes policy guidelines and then leaves it to the discretion of the FCC and the PSCs to deal with the many diverse and unpredictable individual situations. By limiting the PSC to the federal "minimums," the Arkansas Act has confined the PSC to a non-existent standard. In Order No. 11, the PSC appears to have resolved this question by concluding that it can impose nothing more on SWBT than the literal requirements of the Communications Act and those portions of the FCC's *Local Interconnection Order* which SWBT failed to convince the Eighth Circuit to invalidate.

In its response to the FCC's issues list, SWBT unsurprisingly finds "no conflict" between the Arkansas Act and the Communications Act. In fact, SWBT states that the "Arkansas PSC can – indeed, must – interpret for itself what constitutes the 'minimum requirements' of section 251 and is not limited to the requirements specified in the FCC's *Local Competition Order*."¹⁴ SWBT goes on to say that to the extent the PSC "believes that section 251 requires interconnection, unbundling, or resale that is not explicitly required in the *Local Competition Order*, the PSC *may* under Arkansas law – and *must* under federal law – impose those obligations."¹⁵ Ominously, SWBT adds that if it disagrees, SWBT "may seek judicial review."¹⁶

Clearly, SWBT and the Arkansas PSC have very different views of the meaning of the Arkansas Act. SWBT states that the Arkansas Act allows the PSC to make whatever findings and take whatever actions the PSC deems to be "required" by the federal Act. So long as the PSC can justify its conclusions on the basis of the federal statute and can defend its reasoning in court, SWBT finds it to be unconstrained by the Arkansas Act. In contrast, the PSC views the Arkansas Act as relegating it to the ministerial role of reiterating that which is literally stated in the federal law or contained in the FCC's *Local Competition Order*. This view puts the PSC in an unacceptable straitjacket, especially in light of the Eighth Circuit's invalidation of many important aspects of the FCC's order.

In interpreting a statute involving an expert agency, great deference must be given to an agency's reasonable interpretation of its enabling statute.¹⁷ The Arkansas PSC has read the

¹⁴ SWBT Response to Question No. 5.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The scope of review of an agency's interpretation of law is partly addressed by the Administrative Procedure Act in 5 U.S.C. § 706: "[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of an agency action." However, in deciding a question of law, a court often relies on the respect for and
(continued...)

Arkansas Act to preclude it from fulfilling the role assigned to it by the federal Act. It concluded that it "is without authority to order SWBT to provide any terms or conditions in an interconnection agreement which SWBT is not willing to provide to AT&T as a CLEC."¹⁸ In light of this statutory interpretation by the PSC, the FCC should take upon itself the interconnection agreement arbitration duties of the PSC pursuant to section 252(e)(5), as proposed by e.spire in its Petition of March 25, 1997.

In its questions to SWBT and AT&T, the FCC also asked whether the federal Act delegates authority to the states or to the state PSCs. Both AT&T and SWBT answered that the Act delegates power to the PSCs, a view shared by e.spire. SWBT adds, however, that the legislature is empowered to limit the actions of the PSC to the extent they exceed the requirements of federal law.¹⁹ Again, ACSI shares this view. However, in cases where the legislature limits the PSC in ways which prevent it from carrying out the duties assigned to it by the Communications Act, including matters committed by the Communication's Act to the reasonable discretion of the state commissions, the state law is subject to preemption under section 253 of the federal Act. Indeed, the FCC has stated: "We find that Congress enacted section 253 to ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition."²⁰ As interpreted by the Arkansas PSC, the Arkansas Act is such a law.

As described in e.spire's Petition over a year ago, the Arkansas Act should be preempted under both sections 252 and 253. Section 252 applies where a state commission "fails to act to carry out its responsibility" under section 252.²¹ Section 253 applies in order that no state

(...continued)

the specialized knowledge of the agency. As the Supreme Court has explained: "Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference. . ." *United States v. Clark*, 454 U.S. 555, 565 (1982). The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgement for that of the agency, but rather uphold a decision even of less than ideal clarity as long as the agency's path may reasonably be discerned." See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Inc. Co.*, 463 U.S. 29, 43 (1983). In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court set out a two-part test for the review of an agency's interpretation of a statute that it is entrusted to administer. If the intent of the legislature is clear, the Court said, the court and the agency must give effect to that intent. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron* at 843. Thus, under *Chevron*, courts typically defer to an agency's reasonable interpretation of ambiguous provisions in the agency's enabling statute.

¹⁸ Order No. 11 at 6.

¹⁹ See SWBT Response to Question No. 13.

²⁰ *Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 9 CR 958, 970 (rel. Oct. 1, 1997).

²¹ 47 U.S.C. § 252(e)(5).

Ms. Magalie Roman Salas
April 16, 1998
Page 6

or regulation "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."²² The Arkansas Act, as interpreted by the expert agency charged with its administration and enforcement, merits preemption on both counts.

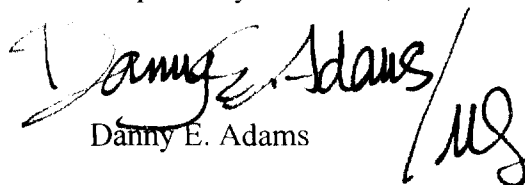
The failure of the FCC to exercise its preemptive duties in these circumstances would permit SWBT to succeed in thwarting the congressional intent in the Communications Act by creating a "Catch 22." By persuading the Arkansas legislature to limit the PSC to the "minimum" required by the federal Act, and then convincing the Eighth Circuit to invalidate the FCC's interpretation of large portions of those requirements as intruding impermissibly on state authority, SWBT will have prevented *both* the FCC and the PSC from overseeing its interconnection obligations in any meaningful way. By these machinations, SWBT will have essentially gutted the interconnection and unbundling provisions of the Communications Act.

If the Commission does not intervene and preempt the anti-competitive provisions of the Arkansas Act, the inevitable result will be to retard the growth of local competition in Arkansas and elsewhere. Failure to preempt the Arkansas statute surely will encourage SWBT and other ILECs to promote the passage of similar legislation across the nation. Thus, the need for immediate action by the Commission is compelling.

It seems clear in light of the conclusions of the Arkansas PSC in interpreting its own enabling statute that it has been rendered incapable of fulfilling its duties under Section 252 by the Arkansas Act. In order to preserve an opportunity to seek meaningful interconnection arbitrations under the Communications Act, the Commission must take this opportunity to grant the e.spire Petition.

In accordance with the Commission's rules governing ex parte presentations, two (copies) of this letter are being submitted. Thank you for your consideration.

Respectfully submitted,


Danny E. Adams

cc: Jonady Hom
Richard Welch

²² 47 U.S.C. §253(d).